

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1786

EUGENE JAMES LOYACANO,
Petitioner,

versus

NEILA LE BLANC, wife of
EUGENE JAMES LOYACANO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI
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STATE OF LOUISIANA

The petitioner, Dr. Eugene James Loyacano, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana entered in these proceedings on April 10, 1978.

OPINIONS BELOW

The original opinion of the Louisiana Court of Appeal for the Fourth Circuit, reported at 311 So.2d 910 (1975), writ refused, 313 So.2d 847 (1975), appears in Appendix A hereto. The opinion of the Louisiana

Court of Appeal for the Fourth Circuit after remand, reported at 343 So.2d 365 (1977), appears in Appendix B hereto. The original opinion of the Supreme Court of Louisiana, not yet reported, appears in Appendix C hereto. The opinion of the Supreme Court of Louisiana on rehearing, not yet reported, appears in Appendix D hereto.

JURISDICTION

The original opinion of the Supreme Court of Louisiana was entered on January 30, 1978. The opinion and judgment on rehearing of the Supreme Court of Louisiana was entered on April 10, 1978. An order granting a stay of the execution of mandate and the enforcement of the judgment of the Supreme Court of Louisiana pending the filing of this petition for a Writ of Certiorari was issued on April 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

QUESTION PRESENTED FOR REVIEW

Whether Article 160 of the Civil Code of Louisiana, which grants alimony only to wives and not to husbands after divorce, constitutes unjustifiable gender-based discrimination and is an infringement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

Article 160 of the Civil Code of Louisiana provides:

"When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:

1. The wife obtains a divorce;
2. The husband obtains a divorce on the ground that he and his wife have been living separate and apart, or on the ground that there has been no reconciliation between the spouses after judgment of separation from bed and board, for a specified period of time; or
3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.

This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

STATEMENT OF THE CASE

This case involves a dispute over permanent alimony and child support payments being made by the petitioner, Dr. Eugene James Loyacano, to his former wife, respondent, Neila LeBlanc Loyacano,

from whom he was divorced in 1971. The question of child benefit payments is irrelevant to the issue before this Court. The factors concerning the amount of alimony, if any, which should be awarded to the respondent are also irrelevant to the issue before this Court.

On November 17, 1971, respondent obtained a default judgment of divorce from petitioner pursuant to Section 9:301 of the Louisiana Revised Statutes on the ground of having lived separate and apart from petitioner for two years. The judgment further awarded respondent alimony at the rate of \$1000.00 per month.

In May of 1974, respondent filed a rule to increase both the alimony and child support awards. On June 7, 1974, respondent obtained a default judgment increasing the alimony award to \$1100.00 per month and the child support payments to the aggregate sum of \$1500.00 per month. In June of 1974, petitioner filed a motion for a new trial and filed a rule to reduce the child support award and to revoke or reduce the alimony award. On July 26, 1974, the trial judge denied the motion for a new trial and dismissed the rule. Petitioner appealed the judgment to the Louisiana Court of Appeal for the Fourth Circuit, which court set aside the judgments of June 7, 1974 and July 26, 1974, and remanded the case to the trial court for further proceedings.

After a trial on remand, on October 24, 1975, the trial court reduced the alimony to \$300.00 per month and ordered that the child support payments continue at a rate of the aggregate sum of \$1000.00 per month. Both

parties appealed this judgment to the Louisiana Court of Appeal for the Fourth Circuit. The Court of Appeal affirmed that aspect of the trial court's judgment awarding child support payments, but reversed that part of the trial court's judgment awarding alimony and held that no alimony was due the respondent. This judgment was rendered on nonconstitutional grounds which are not relevant to the issue before the Court on this application.

Respondent applied for a writ of certiorari to the Supreme Court of Louisiana on that part of the Court of Appeal's judgment denying her alimony. The writ was granted by the Supreme Court of Louisiana.

When the case was before the Supreme Court of Louisiana, petitioner argued, both in his written brief and upon oral argument, that Article 160 of the Civil Code violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Louisiana Constitution of 1974, which provides in part, "No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of . . . sex"

On January 30, 1978, the Supreme Court of Louisiana reversed the judgment of the Louisiana Court of Appeal for the Fourth Circuit and reinstated the judgment of the trial court. In this opinion the Supreme Court of Louisiana found that while Article 160, standing alone, would violate the above-cited Louisiana constitutional provision prohibiting sexual discrimination, husbands are entitled to receive alimony under another article of the Louisiana Civil Code, Ar-

ticle 21, which permits a judge to decide a case according to equity (by appealing to "natural law and reason, or received usages") in all matters where there is no express law and the positive law is silent. Since the Supreme Court found that Article 160, standing alone, violated the Louisiana Constitution's prohibition against sexual discrimination, it declined to decide the federal constitutional issue in its original opinion.

On February 10, 1978, petitioner applied for a rehearing, and on March 3, 1978, a rehearing was granted.

On April 10, 1978, the Supreme Court of Louisiana adhered to its original holding, but for completely different reasons. On rehearing the Louisiana Supreme Court held that Article 160 of the Civil Code is constitutional under both Article I, Section 3 of the Louisiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Louisiana Supreme Court's ruling on constitutionality is contained on pages 31a through 35a of its opinion of April 10, 1978, which opinion appears in Appendix D hereto.

REASONS FOR GRANTING THE WRIT

I.

This Court Has Granted Writs On A Case Containing A Substantially Identical Constitutional Issue

On May 30, 1978, this Court granted a writ of certiorari in the case of *Orr v. Orr*, No. 77-1119, reported at

351 So.2d 904 (Ala.Civ.App.1977), cert. quashed, 351 So.2d 906 (Ala.1977). The *Orr* case involved a constitutional challenge to an Alabama statute, Tit. 34, §31-33, which, like Article 160 of the Louisiana Civil Code, provides for an award of alimony to females without providing for a corresponding award to males.

The issues in the *Orr* and *Loyacano* cases are substantially identical, and a decision in the *Orr* case will undoubtedly affect the status of Article 160. As will be noted below, *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192 (1977), places strong emphasis on the legislative motive for enacting any statute containing a gender-based classification. Since the legislative motive for the Alabama statute might be different from that underlying Article 160 of the Louisiana Civil Code, a decision in the *Orr* case alone may not serve as an absolute, unqualified precedent for determining the constitutionality of Article 160. This could well lead to further litigation on Article 160 and even another application for writs of certiorari in another case on this question in the future.

In view of the foregoing, and in the interest of settling this important constitutional issue in a final, positive fashion, as well as in the interest of judicial economy, we respectfully submit that this Court should grant a writ in the *Loyacano* case as it did in the *Orr* case, so that the constitutionality of both the Alabama and Louisiana statutes can be finally considered and resolved at the same time.

II.

**The Issue Of The Constitutionality Of Statutes
Providing Alimony Benefits Only To Females
Has Not Been Heretofore Determined By This
Court**

While this Court has decided a number of questions concerning the constitutionality of a variety of gender-based classifications, the issue of the validity of statutes granting alimony only to women and not to men has not been heretofore decided by this Court.

This is a highly important question. In the first place the determination of this issue will further clarify the precise limits of *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974), as will be further discussed below.

In the second place, a decision on this issue will have a strong practical effect, as to counsel's knowledge there are thirteen states which have statutes restricting alimony to women. See *Thaler v. Thaler*, 89 Misc.2d 315, 391 N.Y.S.2d 331, 338 (1977), reversed on nonconstitutional ground, 396 N.Y.S.2d 815 (1977). Consequently, substantial property rights are involved throughout the nation. Furthermore, differences in opinions among state courts as to whether substantially identical state statutes violate equal protection have led to considerable confusion in this area. See, e.g., *Thaler v. Thaler*, *supra*, and *Hendricks v. Hendricks*, 535 S.W.2d 668 (Tex.Civ.App.1976). This confusion and uncertainty is especially prevalent in Louisiana, and is clearly evidenced by the differences among the Justices of the Supreme Court of Loui-

siana as reflected in both opinions of the *Loyacano* case, as well as the numerous concurring and dissenting opinions in this case. Indeed, it is interesting to note that in the concurring opinion on rehearing of Justice Dennis, he said:

"It should be noted that our various opinions today leave the status of Civil Code Article 160 in a state of considerable doubt. Three members of the Court are of the opinion that the article is constitutional and does not deny equal protection of the laws although it discriminates on the basis of sex in granting an important statutory right. Three other members of the Court are of the opinion that if the article were to be interpreted to deny alimony to one sex that it would be unconstitutional, but that it does not contain such a prohibition; and that, since there is other authority in the civil code for granting alimony rights to both sexes, Article 160 does not deny equal protection of the laws. One member of the Court is of the view that Article 160 is unconstitutional.

"Thus it is arguable whether, after our lack of decisiveness today, Civil Code Article 160 is either valid or invalid. Accordingly, while I disagree with much of the plurality opinion, I heartily concur that this matter very much recommends itself for legislative action."

Appendix D, at pages 37a-38a.

The Louisiana Legislature, now in session, has just rejected a bill, supported by the Louisiana Bar

Association, which would have amended Civil Code Article 160 to provide alimony after divorce to former husbands as well as former wives (Times Picayune Newspaper, June 7, 1978).

For the foregoing reasons, we respectfully submit that this important, heretofore undecided constitutional issue should now be determined by this Court conjointly with the Alabama statute in *Orr v. Orr*, *supra*.

III.

The Louisiana Supreme Court Decided The Issue Of The Constitutionality Of Article 160 In A Way Not In Accord With The Applicable Decisions Of This Court

Although this Court has not yet directly passed upon the constitutionality of statutes granting alimony to the wife alone, the reasoning of certain recent decisions clearly indicates that such outmoded statutes are violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971), this Court held that it is a violation of equal protection to provide dissimilar treatment for men and women who are similarly situated. In *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), this Court held that a statute allowing a married man in the United States Air Force to automatically claim his wife as a "dependent" for the purpose of receiving increased medical benefits, but denying such automatic right to the wife,

violated equal protection. The District Court in *Frontiero* said that this statute was based on the assumption that a man was generally the "breadwinner" in the family and the wife typically the "dependent" partner. This Court held that such sex discrimination resulted from "an attitude of 'romantic paternalism' which, in effect, put women, not on a pedestal, but in a cage." 411 U.S. at 684, 93 S.Ct. at 1769. In the subsequent case of *Schlesinger v. Ballard*, 419 U.S. 498, 508, 95 S.Ct. 572, 577 (1975), the Court said that the statutes in *Frontiero* and *Reed* were premised on "archaic and overbroad generalizations".

In 1974, this Court decided the case of *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974), in which it was held that a tax exemption statute did not violate equal protection, even though it favored widows over widowers, because it was designed to rectify the effects of past discrimination against women, i.e., inequality in employment opportunities produced either "from overt discrimination or from the socialization process of a male-dominated culture" 416 U.S. at 353, 94 S.Ct. at 1736.

The Louisiana Supreme Court's decision in the case *sub judice* seems to have been chiefly based on the reasoning of *Kahn* and certain state court cases which followed *Kahn*, e.g., *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. denied, 421 U.S. 929, 95 S.Ct. 1656 (1975), or which were decided prior to *Kahn*. Had the *Loyacano* case been decided in 1974, its decision might arguably have been reasonable. But this is 1978 and a number of important decisions which limited and cast further light on *Kahn* were decided between

1974 and the present time, specifically the cases of *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225 (1975), *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021 (1977), and *Califano v. Webster*, 340 U.S. 313, 97 S.Ct. 1192 (1977). Yet all three of these vitally important opinions were ignored by the Louisiana Supreme Court in the *Loyacano* opinion on rehearing. Except for a casual citation of the *Weinberger* case in a quotation from another Louisiana case, these cases are completely overlooked in the rehearing opinion. Indeed, the *Goldfarb* and *Webster* decisions are not even mentioned.

We submit that the *Weinberger*, *Goldfarb* and *Webster* cases are vital to this issue and virtually compel the nullification of an outmoded, archaic statute such as Article 160. The rule evolved in these three cases was well summarized in the *Webster* case, where this Court said: (1) in order to withstand scrutiny under equal protection principles, a classification by gender must serve important governmental objectives and must be substantially related to the achievement of these objectives; (2) the reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective; (3) however, "the mere recitation of a benign, compensatory purpose is not an automatic shield that protects against any inquiry into the actual purposes underlying a statutory scheme"; and (4) accordingly, the Court has rejected attempts to justify gender classifications as compensation for past discrimination against women when the legislative history of such classification revealed

that it was not enacted as compensation for past discrimination. In the *Webster* case this Court upheld a statute containing a gender-based classification, only because its legislative history clearly showed that it was enacted for the purpose of "compensat[ing] for past employment discrimination against women." 97 S.Ct. at 1195.

In reliance on these Supreme Court cases, the California Supreme Court, in *Arp v. Workers' Compensation Appeals Board*, 19 Cal.3d 395, 138 Cal.Rptr. 293, 298, 563 P.2d 849 (1977), rejected an argument that the purpose of a statute containing a gender-based classification was to provide present redress for past economic discrimination. The California Supreme Court was obviously impressed by the fact that the statute was first passed and revised in 1913 and 1917 respectively, at a time when the paternalistic attitude toward women was still prevalent.

Here, we have a statute which was first enacted in 1827, and it is absolutely impossible that the motive of the Louisiana Legislature at that time was to redress economic inequality between men and women caused by the long history of discrimination against women. On the contrary, at this early date the paternalistic attitude toward women was in its heyday. For example, prior to 1916, in Louisiana a married woman could not contract, alienate or encumber her separate property, acquire any property, or sue or be sued without her husband's authorization. Comment, *The Effect of Recent Acts on the Incapacities and Disabilities of Married Women in Louisiana*, 8 TUL.L.REV. 106, 106-107 (1933). Even the Louisiana Supreme Court, in its

original *Loyacano* opinion dated January 30, 1978 (which was vacated on rehearing), found that the probable legislative purpose of Article 160 was based on the outmoded assumption that married men are capable of supporting dependents, whereas married women usually could not support themselves:

"The general policy consideration and practical reason which appear to have induced the legislature to provide alimony after divorce was to prevent divorced women without sufficient means from becoming wards of the state. Although the legislative history of Civil Code article 160 sheds little light on the different treatment accorded husbands and wives, the most reasonable and probable basis is the assumption that married men were capable of supporting dependents, whereas married women usually could not support themselves. Although the assumption may have had substantial empirical support at the time of the legislation's enactment, it is clearly outmoded in today's society in which nearly half of the married women are employed and contribute to the standard of living of their families." Opinion of January 30, 1978, at pages 18a-19a of Appendix C.

In view of the Louisiana Supreme Court's failure to recognize and apply the *Weinberger*, *Goldfarb* and *Webster* decisions to the case *sub judice*, we respectfully submit that the uncertain, indecisive plurality holding of the Louisiana Supreme Court on rehearing is not in accord with the applicable decisions of this

Court. In fact, the Louisiana Supreme Court's holding in the case *sub judice* ignores this Court's latest pronouncements on the issue of sex-gendered statutes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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CERTIFICATE OF SERVICE

I certify this ____ day of June, 1978, that I have served copies of the foregoing petition for writ of certiorari, and the attached appendix upon A. D. Freeman, Esq., attorney for respondent, Mrs. Neila LeBlanc Loyacano, by mailing same, postage prepaid, addressed to him at his office at 1606 First National Bank of Commerce Building, New Orleans, Louisiana 70112.

JACOB J. MEYER

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APPENDIX A

**COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA**

**NEILA LeBLANC, WIFE OF EUGENE JAMES
LOYACANO**

versus

NO. 6742

EUGENE JAMES LOYACANO

**APPEAL FROM THE CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS, NO. 530-979,
HONORABLE GEORGE C. CONNOLLY, JR., JUDGE.**

**HARRY T. LEMMON
JUDGE**

(Court composed of Judges L. Julian Samuel, Harry T.
Lemmon and John C. Boutall)

A. D. FREEMAN
Attorney for Plaintiff-Appellee

WIEDEMANN & FRANSEN
(Lawrence D. Wiedemann)
Attorney for Defendant-Appellant

**JUDGMENTS SET ASIDE,
CASE REMANDED**

This appeal involves judgments on two rules relative to modification of an award of alimony and child support.

In November, 1971 Mrs. Eugene Loyacano obtained a default judgment of divorce pursuant to R.S. 9:301 on the grounds of living separate and apart for two years. The judgment further awarded Mrs. Loyacano alimony at the rate of \$1,000.00 per month and support for their two minor children at the rate of \$1,000.00 per month, as prayed for in the petition.

In May, 1974 Mrs. Loyacano filed a rule to increase both the alimony and child support awards, alleging among other things that Dr. Loyacano had previously supplemented these awards on a voluntary basis but had stopped the supplemental payments. Judgment on the rule, rendered by default on June 7, 1974, increased the alimony and child support to \$1,100.00 and \$1,500.00 per month respectively.

On June 10, 1974 Dr. Loyacano, appearing through counsel for the first time in the record, filed a motion for a new trial, contending that the law and the evidence did not support the judgment rendered on the rule.

On June 13, 1974 Dr. Loyacano additionally filed a rule to reduce the child support and to revoke or reduce the alimony.

The hearing on the application for new trial, on the rule to reduce, and on other rules not pertinent to this appeal, was held on July 26, 1974. The trial judge on the

same day signed a judgment denying the new trial and dismissing the rule. Nineteen days later Dr. Loyacano filed a petition appealing "devolutively from the final judgment rendered in the above entitled and numbered cause on the 26th day of July, 1974."

At the threshold we must decide whether Dr. Loyacano's appeal brings before us for review the judgment of June 7, 1974, which increased the original alimony and child support awards.

In *Fruehauf Trailer Company v. Baillio*, 204 So.2d 139 (La. App. 4th Cir. 1967) the trial court judgment was rendered on May 18, 1966; the timely application for a new trial was denied by judgment rendered August 8, 1966; and the appellant filed a motion for appeal stating that he desired to appeal from the August 8 judgment. This court observed that a judgment denying a motion for new trial is not appealable and, since appellant had no right to appeal from the August 8 judgment, dismissed the appeal. The Supreme Court reversed at 252 La. 181, 210 So.2d 312 (1968), holding that an appeal will not be dismissed for technicalities and that appellant's inadvertency did not constitute a substantial cause for dismissal. The court noted that appellant obviously intended to and did appeal from the May 18 judgment. See also *Kirkeby-Natus Corp. v. Campbell*, 250 La. 868, 199 So.2d 904 (1967).

In the present case there were two final judgments which had not yet become definitive when the appeal was filed. However, the judgment of June 7 increasing alimony and child support and the judgment of July 26

denying the rule to decrease alimony and child support were so interrelated that we cannot reasonably conclude the husband's appeal was intended to seek relief from only one judgment, although he did not specifically mention the earlier judgment in his petition for appeal.¹ This conclusion is further buttressed by the fact that Dr. Loyacano's application for a new trial was heard (and judgment denying a new trial rendered) on the date mentioned in his petition for appeal.

We therefore conclude that Dr. Loyacano intended to and did appeal from both the judgment rendered on June 7, 1974 and the judgment rendered on July 26, 1974.

Judgment of June 7, 1974

This default judgment increased the 1971 award of alimony and child support. Mrs. Loyacano, the only witness, testified that her husband had regularly furnished, in addition to the \$2,000.00 monthly support and alimony ordered by the court, an additional amount of approximately \$6,000.00 a year in the form of summer camp, vacation and maid expenses, school tuition, and dental and orthodontist bills. When he discontinued these supplemental payments, Mrs. Loyacano filed the rule to increase.

Mrs. Loyacano did not itemize her own or the children's needs, nor did she offer any specific

¹ When Dr. Loyacano's counsel orally moved for an appeal upon the trial judge's ruling at the completion of the July 26 hearing, he requested that the June 7 testimony also be transcribed, thus indicating further his intention to appeal from both judgments.

evidence to support the need for the requested increase. She offered only general statements that her expenses were greater in caring and providing for teenagers and that costs of food, clothing, utilities and other necessities were higher than in 1971.

We conclude the trial judge erred in granting the increase in child support on the evidence presented. There was no showing as to the circumstances which surrounded the 1971 award or as to any change in circumstances which would justify the increase. Of greater significance, there was no showing of circumstances existing in June, 1974 which would justify an award of \$750.00 per child.

We further conclude the evidence did not support an increase in alimony. Although Mrs. Loyacano testified that she was not employed in June, 1974 and that she had been employed at the time of the 1971 award (and thus showed a change in circumstances), she offered no evidence whatsoever that she did not have sufficient means for her maintenance as contemplated by C.C. art. 160. The wife has this burden of proof. *Frederic v. Frederic*, La., 302 So.2d 903 (1974).

We accordingly set aside the judgment rendered by default on June 7, 1974.

Judgment of July 26, 1974

When Dr. Loyacano attempted to present proof to substantiate his demand for a decrease or termination of alimony and child support, the trial judge declined to consider any evidence which did not relate to a

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change in circumstances since June 7, 1974, the date of the last judgment setting alimony and child support. Inasmuch as we have concluded above that the June 7 judgment must be set aside, there is no valid judgment affecting alimony or child support subsequent to the 1971 judgment which originally fixed the amounts. It is therefore necessary to set aside the July 26 judgment denying the rule for decrease or termination and to remand the case for further evidence, which may include evidence relating to changes in circumstances since November, 1971.

For these reasons, the judgment rendered by default on June 7, 1974 is set aside, and Mrs. Neila Loyacano's rule for an increase in alimony and child support may be reset for hearing upon proper motion. The judgment rendered on July 26, 1974 is also set aside, and Dr. Loyacano's rule to decrease or terminate alimony and child support may be reset for hearing upon proper motion. The case is remanded to the trial court for further proceedings. Assessment of costs will be deferred until disposition of the rules.

**JUDGMENTS SET ASIDE,
CASE REMANDED**

7a

APPENDIX B

**COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA**

**NEILA LeBLANC, WIFE OF DR. EUGENE J.
LOYACANO**

versus

NO. 7862

DR. EUGENE J. LOYACANO

**APPEAL FROM THE CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS, STATE OF
LOUISIANA, NO. 530-979, HONORABLE GEORGE C.
CONNOLLY, JR., JUDGE.**

**PATRICK M. SCHOTT
JUDGE**

**(Court composed of Judges James C. Gulotta, Patrick
M. Schott and Ernest N. Morial)**

**WIEDEMANN & FRANSEN (Lawrence D.
Wiedemann) and COLEMAN, DUTRY, THOMSON,
MEYER & JURISICH (Jacob J. Meyer),
Attorneys for Defendant-Appellant**

**SATTERLEE, MESTAYER & FREEMAN (A. D.
Freeman),
Attorneys for Plaintiff-Appellee**

**REVERSED IN PART
AFFIRMED IN PART, AND
RENDERED**

This case is before us after a trial on remand pursuant to our opinion in *Loyacano v. Loyacano*, 307 So.2d 910 (La. App. 4th Cir. 1975). Mrs. Loyacano had originally secured a judgment in November, 1971, providing her with \$1,000 per month alimony and \$1,000 per month for the support of two minor children born on January 10, 1959, and May 3, 1960. Both parties have now appealed from the judgment which reduced the alimony to \$300 per month and dismissed the rules to increase and reduce child support.

Mrs. Loyacano produced a schedule of expenses which would tend to support an award of \$740 per month per child. On the other hand, Dr. Loyacano produced a schedule of expenses which would tend to support an award of \$432 per month per child. The differences between the figures result from different amounts being allocated for such items as entertainment, allowances, summer camp, vacations and Christmas presents. The record does not indicate that Mrs. Loyacano has exaggerated or that Dr. Loyacano has underestimated these various expenses but the respective figures represent an honest effort on the part of each party to estimate a fair amount for the support of these almost grown children. Nevertheless the nature of an adversary proceeding in which human emotions are so deeply involved invariably results in the parties both shading their estimates to support their respective positions. Furthermore, the problem at arriving at a proper figure for child support cannot be solved by the precise science of mathematics. Invariably the amount fixed by the trial judge is vulnerable to arguments on both sides that it should have been more or less. It is for these reasons,

among others, that our jurisprudence is to the effect that alimony and child support are within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion. *Nicolle v. Nicolle*, 308 So.2d 377 (La. App. 4th Cir. 1975). We are not persuaded that such a showing has been made in the instant case.

Mrs. Loyacano has relied heavily on evidence that until February, 1974, when Dr. Loyacano remarried, he gave to her and/or his children sums of money over and above that which he was required to pay under the November, 1971, judgment for such items as school tuition, salary of a maid, summer camp and vacation and dental work for the children. She argues that his discontinuation of these extra payments resulted in a change in circumstances and a corresponding change in the needs of the children. However, most of the items for which these extra payments were made were included in the schedules of needs for the children which have already been discussed. The largest item among these extra payments, some \$1700 for maid service, was paid at a time when Mrs. Loyacano was employed; that is, before she resigned from her \$500 a month position in July, 1974. That she is no longer working and has custody of her children offsets any increase in need she may have by the elimination of these extra payments for maid service.

As to entitlement of alimony under LSA-C.C.Art. 160, she is not entitled to such if she has sufficient means for her maintenance, and in determining such means her assets must be considered along with her income. *Frederic v. Frederic*, 302 So.2d 903 (La. 1974).

The evidence shows that Mrs. Loyacano became the owner of General Motors common stock in 1972 and 1974 which had a market value of \$5,625 at the time of the trial. She had \$20,000 in certificates of deposit in a savings and loan association, \$1,200 on deposit in savings and checking accounts, and \$2,500 accumulated in a pension fund with her former employer, the Clerk of the First City Court for the City of New Orleans. These total \$29,325. There is a stock pledge of \$6,000 against the savings and loan certificates which was made for the purchase of an automobile in 1975 for \$5,500. In 1973 Dr. Loyacano gave her \$25,000 for the down payment on the home she occupies with her children. This was purchased for \$41,500 and currently has a mortgage balance outstanding of approximately \$28,500, leaving an equity of almost \$13,000. She also owns a 1964 automobile.

We have considered these assets as an established change in circumstances because the stock certificates were purchased in 1972 and 1974 and the savings and loan certificates are all dated 1973. The equity in the Clerk's fund has gone up some \$750 since 1971.

When Mrs. Loyacano's circumstances are considered in the light of the discussions by the Supreme Court in *Frederic v. Frederic*, supra, and *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950), we are required to reverse the trial judge's award of this item.

Accordingly, that portion of the judgment appealed from in favor of Neila LeBlanc Loyacano and against Eugene James Loyacano, condemning him to pay

alimony in the sum of \$300 per month, is reversed and set aside and there is judgment in favor of Eugene James Loyacano and against Neila LeBlanc Loyacano making absolute his rule to discontinue alimony payments.

That portion of the judgment in favor of Neila LeBlanc Loyacano and against Eugene James Loyacano dismissing his rule to reduce child support and maintaining such at \$1,000 per month is affirmed.

Each party is to pay his or her own costs.

**REVERSED IN PART
AFFIRMED IN PART, AND
RENDERED**

/s/ PMS
/s/ JCS
/s/ ENM

APPENDIX C

SUPREME COURT OF LOUISIANA

NO. 59,688

NEILA LEBLANC, WIFE OF
EUGENE JAMES LOYACANO

VERSUS

EUGENE JAMES LOYACANO

ON WRIT OF REVIEW TO THE COURT OF APPEAL,
FOURTH CIRCUIT,
PARISH OF ORLEANS.

DENNIS, Justice.

The questions presented for decision in this case are: whether Louisiana Civil Code Article 160, which allows a court to grant a divorced wife alimony, denies equal protection of the law in contravention of the federal and state constitutions; and whether the court of appeal properly revoked an alimony award as having become unnecessary. We answer both inquiries in the negative, reverse the court of appeal decision, and reinstate the district court judgment.

In 1971 Mrs. Neila LeBlanc Loyacano was granted a divorce from her husband, Dr. Eugene Loyacano, on the grounds of living separate and apart for two years pursuant to Louisiana Revised Statute 9:301. The default divorce judgment provided Mrs. Loyacano

with \$1,000 per month alimony and \$1,000 per month for the support of their two minor children. Dr. Loyacano voluntarily supplemented these payments with extra sums which were discontinued upon his remarriage in February of 1974.

Mrs. Loyacano filed a rule to increase both the alimony and child support awards in May of 1974. Following an involved procedural history,¹ during which Dr. Loyacano filed rules to reduce the child support award and reduce or revoke the alimony, hearings were held on the respective rules in October of 1975. Child support was awarded in the amount of \$500 per month per child and the alimony was reduced to \$300 per month. Both parties appealed to the court of appeal. The child support award was affirmed but the \$300 per month alimony award was revoked. *Loyacano v. Loyacano*, 343 So.2d 365 (La. App. 4th Cir. 1977). We granted Mrs. Loyacano's application for certiorari to review the judgment revoking alimony.² 345 So.2d 57 (La. 1977).

¹ A default judgment on Mrs. Loyacano's rule was rendered on June 7, 1974 which increased the alimony and child support awards to \$1100 and \$1500 per month respectively. Dr. Loyacano subsequently filed a motion for a new trial and a rule to reduce the child support and to reduce or revoke the alimony. The trial judge denied the motion for new trial and dismissed the rules. Dr. Loyacano appealed these rulings and the Fourth Circuit Court of Appeal set aside the default judgment of June 7, 1974, because no change in circumstances was shown at the hearing on Mrs. Loyacano's rule to justify the increases. The case was remanded to the trial court for reconsideration of the rules filed by both parties. *Loyacano v. Loyacano*, 311 So.2d 910 (La. App. 4th Cir. 1975), writ refused, 313 So.2d 847 (La. 1975).

² The issue of child support is not before us.

Alimony after divorce is governed by Article 160 of the Civil Code which authorizes a court, under proper circumstances, to allow the wife alimony out of the property and earnings of the husband.³ There is no provision of positive law which expressly authorizes a court to grant alimony after divorce to the husband.⁴ Defendant-respondent contends that Article 160, therefore, is an unconstitutional denial of equal protection of law prohibited by both the Fourteenth Amendment to the United States Constitution and Article I, §3 of the Louisiana Constitution of 1974.

The argument based on federal constitutional grounds may have merit.⁵ We do not consider it here, however, for we agree that to allow only wives to

3 Louisiana Civil Code Article 160 provides, in pertinent part:

"When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income."

4 Professor Pascal has observed:

"No legislation makes provision for alimony for the husband after divorce and, the marriage being terminated, there is no possibility of reasoning to the husband's right thereto under Article 119 of the Civil Code. Should an 'Equal Rights Amendment' to the U.S. or State Constitution be adopted, however, probably either the husband will have to be awarded alimony under the same circumstances in which the wife can claim it, or alimony will have to be denied the wife in every case." Pascal, *Louisiana Family Law Course*, §11.19, p. 178 (1975).

5 See, *Califano v. Goldfarb*, ___ U.S. ___, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

collect alimony after divorce would amount at least to arbitrary and unreasonable discrimination against persons because of sex and thus a denial of equal protection under the Louisiana Constitution.⁶ Although not based solely on sex, such classifications for purposes of entitlement to alimony after divorce probably were founded on the assumption that all former husbands have sufficient means for their support, or that few divorced women have property and earnings out of which alimony could be paid, or upon both. If these propositions were ever true, common experience tells us that the deviations from them are now too numerous for the classifications to withstand equal protection challenge.⁷

6 La. Const. of 1974, Article I, §3 provides:

"No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

7 " * * * Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. * * * " *Stanton v. Stanton*, 421 U.S. 7, 15, 95 S.Ct. 1373, 1378, 43 L.Ed.2d 688, 695 (1975).

" * * * Statistics compiled by the Department of Labor indicate that in October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force. United States Dept. of Labor, *Women in the Labor Force* (Oct. 1974). * * * " *Taylor v. Louisiana*, 419 U.S. 522, 535, n. 17, 95 S.Ct. 692, 700, 42 L.Ed.2d 690, 701 (1975).

"In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full time 12 months per year. See U.S. Women's Bureau, Dept. of Labor, *Highlights of Women's Employment & Education 1* (W. B.

The failure of the legislature to expressly authorize the allowance of alimony after divorce for male citizens, however, does not necessarily invalidate Civil Code article 160. Because Louisiana is a civil law jurisdiction, the absence of express law does not imply a lack of authority for courts to provide relief. In all civil matters, where positive law is silent, the judge is bound by the Civil Code to proceed and decide according to equity,⁸ i.e., according to natural law and reason, or to received usages. La. C.C. art. 21. This Court has recognized its duty to proceed and decide important issues under these circumstances on many occasions.⁹

Pub. No. 72-191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U.S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). * * * *Frontiero v. Richardson*, 411 U.S. 677, 689, n. 23, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583, 593 (1973).

"Although the underlying assumption that married men support their families and married women do not may once [sic] have borne a substantial and self-perpetuating relationship to hard economic realities, it was not entirely accurate at the time (at the turn of the century, 5 million women workers comprised 18 percent of the total labor force); clearly, it is outmoded in a society where more often than not a family's standard of living depends upon the financial contributions of both marital partners. (Kanowitz, *Women and the Law* (1969) p. 100; U.S. Bureau of the Census, *Statistical Abstract of the U.S.* (96th ed. 1975 p. 346))." *Arp v. Workers' Compensation Appeals Board*, 138 Cal.Rptr. 293, 563 P.2d 849, 854-5 (Cal. Sup. Ct. 1977).

⁸ In connection with matters of contractual interpretation Article 1965 declares that equity "is founded in the Christian principle not to do unto others that which we would not wish others should do unto us . . ." La. C.C. art. 1965.

⁹ Professor Yiannopoulos' random selection of cases provides an insight into the jurisprudence under Article 21 of the Civil Code:

* * * In *Minyard v. Curtis Products, Inc.* [251 La. 624, 205 So.2d 422 (1967)], the Supreme Court took a decisive step toward generalization of the remedy of unjust enrichment

In order to ascertain if there truly is no positive law either authorizing or prohibiting the allowance of alimony for divorced men we must carefully examine the legislative expressions in the light of the other articles of the Civil Code pertaining to the application and construction of laws.¹⁰ We are also mindful of the doctrine of reputable scholars, which teaches that civilian judges are not required to depend merely upon a logical analysis of the existing statutes, but may employ other recognized methods of interpretation. They may perform extensive exegesis to discover the original legislative intent; legislative texts

in Louisiana, relying expressly on Articles 21 and 1965 of the Civil Code. In *West v. Ortego* [325 So.2d 242 (La. 1975)], in the absence of a rule of positive law, the Louisiana Supreme Court resorted to Article 21 of the Civil Code for the apportionment of workmen's compensation benefits between the community of acquets or gains and the separate property of the injured spouse. In *Jacob v. Roussel* [156 La. 171, 100 So. 295 (1924)], when the receiver of an insolvent corporation abandoned an existing lease prior to its termination and the owner was compelled to grant a new lease at a lower rental, the court held the receiver responsible for the difference, this being the 'equitable' solution in the absence of positive law. In *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* [27 La. Ann. 138 (1875)], the court granted a remedy for the reparation of an injury in the absence of procedural law governing the action. In *Frazier v. Willcox* [4 Rob. 517 (La. 1843)], when a debtor was wasting his property to the prejudice of his creditors, the court allowed the creditors to take conservatory measures by reference to Article 21. In *Ouachita Parish Police Jury v. Northern Ins. Co.* [176 So. 639 (La. App. 2d Cir. 1937)], when a fire risk had been covered by several insurance companies, the court maintained that there should be a proportional distribution of the loss among them. Finally, in *Lawton v. Smith* [146 So. 361 (La. App. 2d Cir. 1933)], the court apparently adopted the notion of abuse of right, holding that equity prevents a first mortgagee from exercising his choice in such a way as to injure the second mortgagee without benefit to himself." A. Yiannopoulos, *Louisiana Civil Law System*, §38 (1977).

¹⁰ La. C.C. arts. 13-20.

may be interpreted so as to give them an application that is consistent with the contemporary conditions they are called upon to regulate; and a particular conflict of interests before the court may be resolved in accordance with the general policy considerations which induced legislative action rather than by reliance on logical deductions from the language of the text.¹¹ Both the codal and the doctrinal principles should be employed to discover the meaning of the words of the law.

The general policy consideration and practical reason which appear to have induced the legislature to provide alimony after divorce was to prevent divorced women without sufficient means from becoming wards of the state.¹² Although the legislative

11 A. Yiannopoulos, *Louisiana Civil Law System*, §47, pp. 89-93 (1977); Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 La. L. Rev. 357, 371 (1973); Tate, *Law Making Function of a Judge*, 28 La. L. Rev. 211 (1968); Tate, *Louisiana and the Civil Law*, 22 La. L. Rev. 727 (1962).

12 In theory, according to Planiol, alimony was not a continuance of the obligation of support which the spouses owe to each other mutually during the marriage, but was founded upon the delictual principle "whatever act of man causes damage to another obliges him by whose fault it happened to repair it." 1 M. Planiol, *Civil Law Treatise*, No. 1259 (La.St. L. Inst. transl. 1959). However, it would appear that the underlying practical reason for alimony is to provide support for those who need it, with a minimum amount of social dislocation, by extracting it from those who have provided similar maintenance in the past. As Planiol observes:

"The community of life permitted the spouse without means to share the welfare of the other. Suddenly through no fault of the spouse in question, he or she finds himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrong acts." *Id.* at §1259.

It is clear that without the antecedent marital obligation of mutual support there could be no breach of a quasi-delictual obligation or resulting damage upon divorce. Moreover, under Article 160 of our

history of Civil Code article 160 sheds little light on the different treatment accorded husbands and wives, the most reasonable and probable basis is the assumption that married men were capable of supporting dependents, whereas married women usually could not support themselves. Although the assumption may have had substantial empirical support at the time of the legislation's enactment, it is clearly outmoded in today's society in which nearly half of the married women are employed and contribute to the standard of living of their families.¹³ The evolving nature of the role played by women in our state was clearly and emphatically recognized by the provision banning invidious gender based discrimination in the Louisiana Constitution of 1974.¹⁴ Indeed, the debates at the 1973 Louisiana Constitutional Convention concerning the provision reflect that the delegates considered alimony to be an important statutory right and contemplated that the new equal protection clause would require that it be granted equally to both sex-

present Civil Code, the wife may be allowed alimony without proving the husband's fault. According to Justice Barham, the provision for this alimony is a "legislative attempt to fix economic responsibility for women who, having been deprived by divorce of their husbands' earnings, are now without means or income for their maintenance. This socio-economic legislation is intended to assign responsibility for the dependency of such divorced women so as to relieve them from destitution and the State from their care." *Montz v. Montz*, 253 La. 897, 907, 221 So.2d 40, 44 (1969) (dissenting opinion).

13 Glick and Norton, "Marrying, Divorcing, and Living Together in the U.S. Today," *Population Bulletin*, Vol. 32, No. 5, Oct. 1977, pp. 10-12. (A publication of the Population Reference Bureau, Inc.); H. Hayghe, "Families and the Rise of Working Wives — An Overview," *Monthly Labor Review*, May 1976, pp. 12, et seq.; H. Hayghe, "Special Labor Force Report — Marital and Family Characteristics of the Labor Force," *Monthly Labor Review*, Nov. 1975, pp. 52, et seq.; Kanowitz, *Women and the Law*, p. 100 (1974).

14 La. Const. 1974, Art. I, §3.

es.¹⁵ Consequently, when we attribute to Article 160 the meaning that a present day legislator would have attributed to it, we must assume that he would have taken cognizance of the increasing and expanding nature of women's activities and responsibilities, as well as our constitution's prohibition of arbitrary or unreasonable gender based legal classifications, and that he would not have intended by the legislation to discriminate against husbands who have not sufficient means for their maintenance by declaring them ineligible for alimony after a divorce.

Accordingly, the question of alimony for a husband after divorce is a civil matter upon which there is no express or implied law,¹⁶ and we are bound to proceed and decide according to equity. La. C.C. art. 21. Our appeal to natural law and reason informs us that the general policy considerations which induced the legislature to authorize alimony allowances for wives after divorce would also be served by granting such support to either spouse when the circumstances provided by Article 160 prevail. Equity and our constitution demand that the husband be awarded

¹⁵ Another indication of this intention is seen in the manner in which Article I, §3 was produced by the convention. The original committee proposal, which contained language that could be read as an absolute ban against gender based discrimination, was replaced by a compromise which, as amended and finally adopted, forbids arbitrary, capricious or unreasonable discrimination because of sex. Since both the proponents of the original proposal and its opponents, who favored simply borrowing the general language of the Fourteenth Amendment's equal protection clause, expressed sentiments for the retention of alimony laws, the almost unanimous vote for the compromise indicates an expectation that alimony would be allowed to both spouses. See, XII, *Constitutional Convention of 1973, Verbatim Transcripts*, August 29, 1973, pp. 57, et seq.; August 30, 1973, pp. 1-6.

¹⁶ See, footnote 4, *supra*.

alimony under the same circumstances in which it can be claimed by the wife. For these reasons, we conclude that a Louisiana court may allow alimony to a husband after divorce, under the same circumstances in which it can be claimed by the wife, and that the contention of the defendant-respondent that Civil Code Article 160 denies equal protection of the law is without merit.

II.

In the case at bar the original alimony award, contained in the 1971 divorce decree, was rendered with the consent of Dr. Loyacano. This consent amounted to a judicial admission on his part that his wife was entitled to alimony. Therefore, when Dr. Loyacano filed his rule to decrease or revoke the alimony, it was incumbent upon him to prove that Mrs. Loyacano's circumstances, or his own, had changed in order to obtain a reduction or revocation of the alimony. *Bernhardt v. Bernhardt*, 283 So.2d 226 (La. 1973); *Fisher v. Fisher*, 320 So.2d 326 (La. App. 3d Cir. 1975).

Although Dr. Loyacano had remarried, he stipulated that he could pay any amount of alimony ordered by the court. Therefore, a change in his circumstances was not urged as the basis for the reduction or revocation of the previous alimony award.

Dr. Loyacano introduced evidence that his former wife owned assets valued approximately as follows: savings and loan certificates of deposit, \$20,000; bank accounts, \$1200; pension fund contributions, \$2500; corporate stock, \$5,625; 1974 automobile, \$5,300 (original cost); 1975 automobile, \$5,500 (original cost);

house, \$41,500. Her liabilities included: \$28,500 indebtedness secured by a mortgage on the house; \$6,000 certificate of deposit pledge to finance the purchase of an automobile. The evidence also reflected that Dr. Loyacano had given her, over a period of time, \$25,000 in cash, part of which was used for a down payment on her house. Mrs. Loyacano had elected to be a full-time mother and homemaker, and was not otherwise employed at the time of the trial, although she had been a wage earner in the past.¹⁷

The trial court found that Mrs. Loyacano's circumstances had changed favorably but that she still lacked means sufficient for her maintenance. Accordingly, her alimony was reduced from \$1,000 to \$300 per month. The court of appeal determined that the lower court's finding of insufficient means was manifestly erroneous in the light of *Frederic v. Frederic*, 302 So.2d 903 (La. 1974), and *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950), and set aside the alimony award.

In *Smith v. Smith*, this Court defined terms crucial to the requirement of Louisiana Civil Code Article 160 that the wife must be without sufficient means for her maintenance to be eligible for alimony after a divorce. We said that "means" included both income and property, and that "maintenance" consisted primarily

¹⁷ Only a minority of this Court is of the opinion that a woman's earning capacity should be considered, together with the need for her services at home as a parent, the availability of suitable employment, and other relevant factors, in determining whether she has sufficient means for her support. See, *Ward v. Ward*, 339 So.2d 839 (La. 1976); see also, *Ward v. Ward*, 332 So.2d 868 (La. App. 4th Cir. 1976).

of food, shelter and clothing. The opinion of the Court took pains, however, to point out that the wife need not be practically destitute to qualify for alimony, but that she could apply if she had some means which were not sufficient. With equal care the Court cautioned that a wife with property should not be made to *fully* deplete her capital before she is allowed alimony. But the Court did not find it necessary to decide to what extent the wife should be made to use up her capital before applying for the alimony, because it found that property and assets valued at \$20,000 at the time of the divorce in 1948 were certainly sufficient means for her maintenance at that time. Therefore, the Court purposely left unanswered the question of what manner and rate of asset depletion may be required of the wife in calculating her entitlement to alimony.

A number of dimensions have been added to these definitions in later decisions by this Court. The meaning of "maintenance" was enlarged to include "reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities, household expenses, and the income tax liability generated by the alimony payments made to the former wife."¹⁸ In *Frederic v. Frederic*,¹⁹ the element of the liquidity of the wife's assets was introduced as a factor which should be considered in determining whether her means were sufficient for her maintenance. The courts of appeal, in reviewing trial

¹⁸ *Bernhardt v. Bernhardt*, 283 So.2d 226, 229 (La. 1973).

¹⁹ 302 So.2d 903 (La. 1974). This consideration would include determining whether assets, such as thrift and annuity funds, are presently available for maintenance. See, *Bryant v. Bryant*, 310 So.2d 648 (La. App. 1st Cir. 1975).

judges' determinations of "sufficient means," have considered the additional factors of the relative financial positions of the parties,²⁰ the type of asset under consideration and the consequences of its liquidation.²¹

All of these factors should be taken into consideration in determining whether alimony should be allowed, and, if so, in fixing the amount of the award. On the question of what extent of asset depletion, if any, should be required of a spouse before he or she may receive alimony, it is impossible to say what relative weight must be given to any one factor in a particular case. The court should instead apply a rule of reasonableness in light of all the factors named herein and any other circumstances relevant to the litigation. For example, in determining the rate at which a spouse may be required to deplete his or her assets, it may be pertinent to consider the mental and physical health of the parties, their age and life expectancy, the parties' other financial responsibilities, the relative ability, education and work experience of the parties, and the potential effect of any contemplated depletion of assets upon the children of the marriage. The problem is of such a nature as to be insusceptible of solution by any exact formula or monetary index, and

20 *Phillpott v. Phillpott*, 321 So.2d 797 (La. App. 4th Cir. 1975). This Court has also alluded to the "highly inequitable" nature of an alimony award in which the wife would be "permitted to retain [her property] and at the same time cause her husband to deplete his." *Smith v. Smith*, *supra*, 47 So.2d at 35.

21 See, e.g., cases discussing whether sale of the family home should be required, *Phillpott v. Phillpott*, *supra*; *Bryant v. Bryant*, 310 So.2d 648 (La. App. 1st Cir. 1975); *Nicolle v. Nicolle*, 308 So.2d 377 (La. App. 4th Cir. 1975); *Hardy v. Hardy*, 214 So.2d 231 (La. App. 4th Cir. 1968).

the court should proceed with great caution and due regard for the probable long range effects of any depletion contemplated.

Under the provisions of Article 160 of the Civil Code, it is within the discretion of the trial judge to allow and fix the amount of alimony. The discretion granted by the code article means sound discretion, to be exercised by the trial judge, not arbitrarily or wilfully, but with regard to what is just and proper under the facts of the case. *Fletcher v. Fletcher*, 212 La. 971, 34 So.2d 43 (1948); *Jones v. Jones*, 200 La. 911, 9 So.2d 227 (1942); *Abbott v. Abbott*, 199 La. 65, 5 So.2d 504 (1941).

According to the evidence of record in the instant case, Mrs. Loyacano owned property having a net value of approximately \$46,000. Some of the assets were easily susceptible of liquidation while others could only be converted to cash with difficulty and perhaps great loss in utility and value. From our review of the trial judge's reasons for judgment it is apparent that he considered the factors which have been presented in the jurisprudence and some of the additional ones suggested in this opinion. It is clear that the court determined Mrs. Loyacano had *some* means but not *sufficient* means for her support. It is evident also that the trial court judgment will have the effect of requiring her to deplete her assets to some extent but not as rapidly as if no alimony had been allowed.

The trial judge's decision was not contrary to the principles of law announced here or in our previous opinions.

Under all of the circumstances presented, including the factors mentioned earlier such as the relative financial positions of the parties, the counterproductive effects of requiring a sale of the family home and the potential effects on the children, as well as the circumstances of the case, it appears that the trial judge exercised sound discretion, did not decide arbitrarily or wilfully, and reached a reasonable and just result. The trial court judgment, therefore, should have been affirmed on appeal.

For these reasons the judgment of the court of appeal is vacated and the judgment of the trial court is reinstated. All costs are assessed to the defendant-respondent.

SANDERS, C.J., dissents and will assign written reasons.

SUMMERS, J., dissents

MARCUS, J., concurs and assigns reasons.

MARCUS, J. (concurring)

I do not agree with the majority that to allow only wives to collect alimony after divorce would amount to arbitrary and unreasonable discrimination against persons because of sex and thus a denial of equal protection under La. Const. art. 1, §3 (1974). Nor do I consider it a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. Rather, I consider that there are many good

reasons to support alimony to a wife after divorce; therefore, La. Civil Code art. 160 provides a reasonable legislative classification, not arbitrary, and rests upon a ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated are treated alike. See discussion and compare *Williams v. Williams*, 331 So. 2d 438 (La. 1976) and *State v. Barton*, 315 So. 2d 289 (La. 1975).

Moreover, I disagree with the majority that courts are permitted to allow alimony to a husband after divorce where the legislature has expressly allowed alimony after divorce only to a wife under conditions set forth in La. Civil Code art. 160. I consider the majority opinion in this respect amounts to legislation by the court.

. However, I concur in the result reached by the majority because I do not consider that the trial judge abused his much discretion in allowing Mrs. Loyacano \$300 per month alimony under the circumstances here presented.

Accordingly, I respectfully concur.

APPENDIX D

ON REHEARING

(Number and Title Omitted)

SANDERS, Chief Justice.

The major issue presented here is whether Louisiana Civil Code Article 160 unconstitutionally denies husbands equal protection of the law. Fourteenth Amendment to the United States Constitution; Article I, §3 of the Louisiana Constitution (1974).

We now hold that although Article 160 does not provide alimony to a needy husband, it is, nonetheless, constitutional and that here the wife is entitled to alimony.

The background facts, as stated on original hearing, are as follows:

"In 1971 Mrs. Neila LeBlanc Loyacano was granted a divorce from her husband, Dr. Eugene Loyacano, on the grounds of living separate and apart for two years pursuant to Louisiana Revised Statute 9:301. The default divorce judgment provided Mrs. Loyacano with \$1,000 per month alimony and \$1,000 per month for the support of their two minor children. Dr. Loyacano voluntarily supplemented these payments with extra sums which were discontinued upon his remarriage in February of 1974.

"Mrs. Loyacano filed a rule to increase both the alimony and child support awards in May of 1974. Following an involved procedural history, during which Dr. Loyacano filed rules to reduce the child support award and reduce or revoke the alimony, hearings were held on the respective rules in October of 1975. Child support was awarded in the amount of \$500 per month per child and the alimony was reduced to \$300 per month. Both parties appealed to the court of appeal. The child support award was affirmed but the \$300 per month alimony award was revoked."

In this Court, the wife seeks restoration of the alimony award.

I.

Does LSA-C.C. Art. 160 allow alimony to a needy husband?

The very first article of the Civil Code provides that "[l]aw is a solemn expression of legislative will." Article 2 discusses the attributes of the law, stating: "[i]t orders and permits and forbids, it announces rewards and punishments, its provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs." "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded, under the pretext of pursuing its spirit." LSA-C.C. Art. 13.

The language of Article 160 clearly excludes a husband's entitlement to alimony from his wife. It limits alimony to "the wife" payable from the "property and earnings of the husband." This exclusion is reinforced by the history of the article. Article 301 of the Code Napoleon (1804) allowed either husband or wife in necessitous circumstances to receive alimony if he or she had obtained a divorce. This provision was omitted from the Louisiana Civil Code of 1808, where divorce, as distinguished from separation from bed and board, was not recognized. Although divorce was authorized in the Louisiana Civil Code of 1825, the provision for alimony after divorce was intentionally omitted. Thus, no alimony was payable, since alimony after divorce is in the nature of a pension and must be specifically authorized. See *Matheny v. Matheny*, 205 La. 869, 18 So.2d 324 (1944); *Player v. Player*, 162 La. 229, 110 So. 332 (1926).

On March 19, 1827, the Legislature in "An Act Relative to Divorces" provided for alimony after divorce for the first time. The alimony was limited to "the wife who has obtained the divorce" and payable "out of the property of her husband." The identical provision was later reenacted in Act 307 of 1855. The provision was later incorporated in the Louisiana Civil Code of 1870 as Article 160. See C. E. Lazarus, "What Price Alimony," 11 La.L.Rev. 401, 412-415. The history of the article demonstrates the deliberate legislative restriction of alimony-after-divorce to the wife.

Article 160 speaks clearly on the subject of alimony. It limits alimony to needy wives.

II.

Is Article 160 constitutional?

It is well settled that equal protection of the law does not require that all persons in all matters be treated in exactly the same manner; neither does it prohibit all classifications.

Article I, Section 3 of the state constitution provides:

"No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." (Emphasis added.)

The section prohibits only arbitrary and unreasonable classification. If a classification is not arbitrary or unreasonable, it has no constitutional infirmity.

We interpreted the foregoing constitutional provision in *State v. Barton*, La., 315 So.2d 289 (1975), as follows:

"The first sentence of the section was intended only as a restatement of the federal equal protection guarantee. . . . The second sentence (which uses absolute language), in com-

parison with the third sentence (which employs the arbitrary, capricious, or unreasonable formula), permits no discrimination because of race or religious ideas, beliefs, or affiliations.

"The third sentence delineates the limitation on the power of the state to discriminate by law against persons of specified classes, including members of either sex. The limitation imposed does not absolutely preclude the legislature from defining the range of persons affected by legislation according to the various classes listed in the section; rather, it proscribes the unreasonable or arbitrary definition of those affected according to class. Accordingly, if the discrimination that results from the legislative classification is found to be within reason, the statute is not in violation of the constitution."

We later cited that language with approval in *Williams v. Williams*, La., 331 So.2d 438 (1976). In upholding the constitutionality of alimony pendente lite, we reasoned further that:

"Nor does the equal protection clause of the fourteenth amendment to the United States Constitution deny this state the power to accord differing treatment to the sexes in its legislation. The United States Supreme Court has held that the equal protection clause does not prohibit a legislative classification based on sex, provided that the classification is

reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated shall be treated alike. *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). See also *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973)."

We have upheld both civil code articles and criminal statutes classifying males and females differently against constitutional attacks. In *Williams v. Williams*, supra, Civil Code Article 148 weathered a constitutional challenge based on equal protection. That article allows alimony pendente lite only to a wife. Similarly, in *State v. Barton*, supra, a statute criminalizing only a husband's non-support of his family survived the same equal protection attack.

Article 160 has previously withstood a direct constitutional challenge on another basis, due process of the law. In *Hays v. Hays*, 240 La. 708, 124 So.2d 917 (1960), we upheld this article despite its sex based classification under the Fourteenth Amendment to the United States Constitution and Article 1, §2 of the Louisiana Constitution of 1921.

Statutes elsewhere allowing alimony only to wives have withstood the equal protection argument which defendant asserts. *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458, cert. denied, 421 U.S. 929, 95 S.Ct. 1656, 44 L.Ed.2d 87 (1974). *Budgen v. Bugden*, 225 Ga. 413, 169 S.E.2d 337, cert. denied, 396 U.S. 1005, 90 S.Ct. 558, 24 L.Ed.2d 497 (1969); *M.v.M.*, 321 A.2d 115 (Del. Supr. 1974); *Hendricks v. Hendricks*, 535 S.W.2d 668 (Ct. App. Tex. 1976).

The United States Supreme Court has upheld the constitutionality of a Florida statute granting widows an annual property tax exemption of \$500, but offering no analogous benefit for widowers. *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974).

Likewise, in *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974), the Court upheld the constitutionality of a California disability insurance system which excluded benefits for normal pregnancy and delivery. The Court reasoned that a state may take one step at a time in legislatively solving problems. As long as the legislative attempts are rationally supportable, the courts will not impose their judgment. Quoting from *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), the Court stated, "*The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.*" (Emphasis added.)

In passing upon constitutionality, it is not within the province of this Court to evaluate the legislative

policy embodied in the statute. Modification addresses itself to the legislature.

We conclude that Article 160 is constitutional.

III.

Is plaintiff intitled to alimony?

A majority of this Court agrees that the trial court's alimony award of \$300 per month is correct. For the reasons set forth in Section II of our original opinion, the trial court's alimony award is reinstated.¹

For the reasons assigned, the judgment of the Court of Appeal is reversed, and the judgment of the district court, awarding the wife \$300 per month alimony, is reinstated and made the judgment of this Court in accordance with the decree on original hearing.

SUMMERS, J., concurs in part and dissents in part for the reasons assigned.

TATE, J., concurs for the reasons assigned.

DENNIS, J., concurs and assigns reasons.

CALOGERO, J., dissents and assigns reasons.

¹ For the reasons set forth in the author's dissent to the Court's original opinion, he believes that the Court of Appeal correctly denied the wife alimony at this time.

Concurring Opinion

(Number and Title Omitted)

TATE, Justice.

I respectfully concur for the reasons assigned by the original majority opinion. The provision granting a divorced wife alone the right to alimony is saved from unconstitutionality on the ground of unreasonable gender-based discrimination only because, interpreting the Civil Code as a whole, a divorced husband in need has the same alimony rights.

On Rehearing

(Number and Title Omitted)

CALOGERO, Justice, dissenting

I believe that it is too clear for argument that Article 160 of the Louisiana Civil Code which allows wives (and not husbands) to claim alimony after divorce unconstitutionally denies to husbands equal protection of the laws as guaranteed by the state and federal constitutions. For a related matter and a fuller expression of my views, see the dissent in *Corpus Christi Parish Credit Union versus Selina K. Martin*, ___ So.2d ___ (La. 1978), No. 61,739 handed down this day. In this case, I would invalidate Article 160 because of its gender-based discrimination but I would not usurp the legislative function by grafting onto our law a con-

stitutionally permissible alimony provision. I believe that function should and will be performed by the legislature.

ON REHEARING

(Number and Title Omitted)

DENNIS, Justice, concurring in decree only.

I concur in the decree for the reasons stated in the original majority opinion.

It should be noted that our various opinions today leave the status of Civil Code Article 160 in a state of considerable doubt. Three members of the Court are of the opinion that the article is constitutional and does not deny equal protection of the laws although it discriminates on the basis of sex in granting an important statutory right. Three other members of the Court are of the opinion that if the article were to be interpreted to deny alimony to one sex that it would be unconstitutional, but that it does not contain such a prohibition; and that, since there is other authority in the civil code for granting alimony rights to both sexes, Article 160 does not deny equal protection of the laws. One member of the Court is of the view that Article 160 is unconstitutional.

Thus it is arguable whether, after our lack of decisiveness today, Civil Code Article 160 is either valid or invalid. Accordingly, while I disagree with

much of the plurality opinion, I heartily concur that this matter very much recommends itself for legislative action.

SUMMERS, Justice (concurring in part and dissenting in part).

I agree that Civil Code Article 160 is constitutional for the reasons stated by the Chief Justice in the opinion authored for the Court on rehearing. However, I dissent from Part III of the opinion on rehearing awarding alimony to the wife.